No. 95-1966

In The

Supreme Court of the United States

October Term, 1995

CAMPS NEWFOUND/OWATONNA, INC.,

Petitioner,

v.

TOWN OF HARRISON, et al.,

Respondents.

On Writ Of Certiorari
To The Maine Supreme Judicial Court

BRIEF FOR THE RESPONDENTS

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June 12, 1996

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STATEMENT OF THE CASE

The petitioner challenges the constitutionality of a Maine statute which directs municipalities to grant exemptions from real and personal property taxes to certain types of nonprofit organizations. Specifically, the petitioner challenges a portion of Me. Rev. Stat. Ann. ("M.R.S.A.") tit. 36, § 652(1)(A)[1] (hereinafter sometimes referred to as the "exemption statute"), which directs that exemptions be granted to "benevolent and charitable institutions" but conditions the exemption as follows: 1) those that benefit "principally" Maine residents receive a full exemption; 2) those that benefit "principally" nonresidents but charge only a nominal fee for their services receive up to $50,000 in property value exemption; and 3) those that benefit "principally" nonresidents and charge more than a nominal fee for their services receive no exemption.[2] It is important to note that, although the

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[1] The relevant portion of the statute is set out at Pet. 20a-21a. Petitioner is in error when it cites the statute as § 652(A)(1)(A). There is no subsection "A".

Other provisions of the statute direct that exemptions be given to literary and scientific institutions, including colleges and universities, fraternal organizations, houses of religious worship, chambers of commerce and other groups. The statutory language at issue in the instant case concerning residency pertains only to charitable and benevolent organizations.

[2] The portion of the statute granting an exemption for the real and personal property of "benevolent, charitable . . . institutions incorporated by this State" was first enacted as a public law in 1845. P.L. 1845, Ch. 159, § 5, ¶ Second. See *O'Connor v. Wassookeag Preparatory School, Inc.*, 46 A.2d 861, 862 (Me. 1946). The language at issue in this case was enacted in

instant case involves a summer camp run by a nonprofit organization, the exemption statute pertains to a wide range of charitable and benevolent organizations.

The petitioner, which was denied an exemption because it benefits principally[3] nonresidents and charges more than a nominal fee, asserts that the exemption statute violates the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

The statute provides that an exemption may not be denied to a nonprofit organization by reason of the "source from which its funds are derived." Thus, the residency of those who contribute or pay fees to the nonprofit organization may not be used to deny the exemption.

It is of importance that the exemption statute pertains to taxes on all real estate and certain personal property in the Town of Harrison. The property is taxed at its "just value." Maine Const. art. 9, § 8; 36 M.R.S.A. § 201. The statute is not an exemption from a tax on

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substantially its current form in 1957. Subsequent amendments are not material to the issues presented here.

[3] The statute is silent as to how to determine whether the charity operates "principally for the benefit" of nonresidents. Here, there was no question because the petitioner admitted that 95% of its campers were nonresidents (Joint Appendix ("J.A.") 44) and made no assertion that it provided any services to Maine residents other than the 5% of its campers from Maine.

If the petitioner opened its facilities to local residents, the value of the services provided would, arguably, be included in the "benefit" test. Further, if the petitioner charged only a nominal tuition, it would be eligible for a $50,000 exemption in value regardless of the residency of its campers.

business activity, *e.g.*, "camper days," or upon the campers themselves.

In sum, the exemption statute creates categories of charitable organizations based on the residency of those to whom they dispense their charity and, in so doing, sets up a kind of *quid pro quo*: Relief from property taxes in return for charitable services to Maine people.[4]

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[4] Contrary to the petitioner's assertion (Petitioner's Brief ("Pet. Br.") 9), Maine's approach to determining which charitable organizations will be entitled to an exemption is not "virtually without precedent." Other jurisdictions have similar, although not identical, provisions. See, *e.g.*, 68 Okl. St. Ann. § 2887(8) (granting exemption from *ad valorem* taxation for charitable institutions, "provided the net income from such property is used exclusively within this state for charitable purposes"); N.C. Gen. Stat. § 105-3(3) (granting exemption from inheritance tax for foreign charitable corporations if the corporation is "receiving and disbursing funds donated in this State for religious, educational or charitable purposes"); D.C. Code § 47-1002(8) (real property exempt from taxation includes buildings belonging to charitable institutions "which are used for purposes of public charity principally in the District of Columbia"). These are in addition to the Michigan statute cited by the petitioner. Mich. Stat. Ann. § 7.7(4n).

The rationale for the distinction drawn by Maine and other jurisdictions in their statutes is common enough to warrant explanation in the treatise by E. Fisch, D. Freed & E. Schachter, *Charities and Charitable Foundations* § 796 (1974):

> Some states exclude from tax exemption property not used for the benefit of the citizens of the state from which tax exemption is sought, whether owned by a domestic or foreign charity. The rationale for denial has been formulated in terms of benefit to the local taxpayers. . . . "Such [an exemption] would be a direct

The petitioner is a Maine nonprofit corporation[5] which operates a 180 acre summer camp on the shores of Long Lake in Harrison, Maine.[6] While the petitioner may advertise its facility and recruit campers from other states, its product is delivered wholly intra-state.

The petitioner pays about $22,000 per year in property taxes.[7] By letter to the Harrison Town Manager dated

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diversion of the state's resources at the expense of its resident taxpayers." (Footnotes omitted.)

Fisch *et al.*, at 619. The authors go on to discuss contrary rationales which hold that the charity should help people worldwide and should not be provincial. Which rationale to accept is, however, a legislative decision.

[5] The exemption statute has, for more than 150 years, provided that the tax exemption for charitable and benevolent organizations is limited to corporations organized under Maine law. It is not clear whether this language would be interpreted today as excluding from exemption eligibility non-Maine corporations registered to do business in Maine. If it were so interpreted, it would be of suspect constitutionality. See *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968). In any event, that issue is not presented in the instant case because the petitioner is a Maine nonprofit corporation and because the petitioner was not denied an exemption on the basis of that language in the exemption statute.

[6] Although not part of the record, the following information may be of interest to the Court. The Town of Harrison is located in Cumberland County, about 40 miles northwest of Portland. Its 1994 population was 2,200. *Maine Register* 1995-96.

[7] The petitioner's real estate taxes for 1989 were $24,639.65; for 1990 were $21,618.49; and for 1991 were $20,770.71 (plus $994.70 for personal property). J.A. 42-43, ¶¶ 26, 27, 28. Town of Harrison property tax bills show assessed values for "land," "buildings," and "personal property" and a tax for "real estate"

April 15, 1992, the petitioner demanded a tax refund for the years 1989 through 1991 and a continuing tax exemption pursuant to the exemption statute. J.A. 19. The petitioner acknowledged in that letter that "the principal number of our children" are out-of-state residents; made no claim that it benefits principally Maine residents; and acknowledged that the statute does not allow exemptions for such camps. Nevertheless, the petitioner claimed entitlement to an exemption on the grounds that the statute is unconstitutional. The Harrison Board of Assessors,[8] to whom the letter had been referred, responded through the Town Manager that they were not empowered to decide upon the constitutionality of the statute and they denied the exemption request.[9] J.A. 21.

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and "personal property." Real estate includes land and buildings. Apparently the petitioner's bill from the Town of Harrison for 1991 showed a "real estate" portion of the bill at $20,770.71 and a personal property tax of $994.70. J.A. 43. The break-down is about 95% real estate and 5% personal property. Personal property would include such items as refrigerators, stoves, furniture, and equipment. Hereinafter, the term "real estate taxes" will be used to refer to the taxes here at issue.

[8] The municipal assessors act as agents of the State and must carry out State laws on taxation. *Dillon v. Johnson*, 322 A.2d 332 (Me. 1974). It is the municipal assessors who have authority to grant tax abatements and exemptions in accordance with State law. 36 M.R.S.A. § 841.

[9] The statute contains a number of "further conditions," not at issue here, to the right to an exemption. 36 M.R.S.A. § 652(1)(C). During the course of this litigation, the parties stipulated or did not contest facts that, but for the statutory provision at issue here, would qualify the petitioner for a full exemption as a charitable and benevolent institution. J.A. 36-46, 52-53.

The petitioner brought a two count complaint in the Maine Superior Court challenging the denial of the requested exemption. J.A. 13, *et seq.* The Superior Court granted summary judgment to the petitioner on the first count of its Complaint, finding that the exemption statute violates the Commerce Clause. The Superior Court rejected the petitioner's Equal Protection challenge. U.S. Const. amend. XIV. (The second count of the Complaint had been dismissed earlier. It alleged a violation of 42 U.S.C. § 1983.) Pet. 9a, *et seq.*

The respondents appealed the Superior Court decision to the Maine Supreme Judicial Court, sitting as the Law Court (hereinafter "Law Court").[10]

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[10] This was the second time that the Law Court was faced with a constitutional challenge to the exemption statute. In *Green Acre Baha'i Institute v. Town of Eliot*, 193 A.2d 564 (Me. 1963), the Law Court upheld the same statutory provision, stating:

> We cannot say that it is unreasonable for the State to require the ordinary and normal support of government when a corporation as here principally benefits nonresidents, and to remit taxes when benefits accrue to our own residents. Exemption from tax places an equivalent burden on the remaining taxpayers. Loss in tax revenue from exemption must be balanced by increased assessments on others.
>
> In our view, the denial of exemption to the property of a Maine benevolent and charitable corporation "in fact conducted or operated principally for the benefit of (nonresidents)" is a constitutional exercise of legislative power.

Id. at 566.

This was also the second time that the Law Court was faced with a claim for a tax abatement by the petitioner. *Camps*

The Law Court reversed the Superior Court with respect to the Commerce Clause analysis and affirmed its holding with respect to the Equal Protection Clause. Pet. 7a. The Law Court also held that the exemption statute does not violate the Privileges and Immunities Clause. U.S. Const. art. IV, § 2, cl. 1. Pet. 7a-8a.

SUMMARY OF ARGUMENT

The Maine exemption statute does not discriminate on its face against interstate commerce and, therefore, the Law Court was correct in its decision to apply the "more flexible approach" and in its conclusion that the exemption statute does not violate the dormant Commerce Clause. However, this Court can affirm the Law Court's holding without reaching the question of whether the exemption statute should be analyzed under the "virtually *per se* rule of invalidity" or the "more flexible approach" (a) because real estate tax exemptions for charitable organizations are properly analyzed as expenditures of general fund money by the government to lessen its burden of providing social services and to promote the public good or (b) because Congress may not impose a national real estate tax and, therefore, State statutes providing exemptions from real estate taxes do not intrude into a sphere of Congressional authority and, thus, do not violate the dormant Commerce Clause.

Newfound/Owatonna, Inc. v. Town of Harrison, 604 A.2d 908 (Me. 1992).

1. Real estate taxes are an essential source of revenue for local governments. There is no right under the United States Constitution or the Maine Constitution to an exemption from real estate taxes and it is the province of State legislatures to determine which, if any, nonprofit organizations will receive an exemption and what criteria they must meet to qualify for the exemption. This type of "discrimination" among such organizations is not forbidden by the Commerce Clause. It is subject to review under the equal protection and due process provisions of both Constitutions and the privileges and immunities provisions of the United States Constitution.

2. The children and adults who attend the petitioner's camp are not articles in interstate commerce but, rather, are consumers crossing State lines to purchase and "consume" camping services delivered within Maine. The fact that the campers cross State lines to consume the petitioner's services does not convert those services from intra-state to interstate articles of commerce.

3. The exemption statute is facially and fundamentally about taxation of real estate, a type of property that cannot be exported or imported across State lines. Any effect that the statute has on interstate commerce by causing the petitioner to charge higher tuition or to provide fewer services is secondary and incidental and does not invoke the "virtually *per se* rule of invalidity."

4. The exemption statute is properly viewed as an expenditure of government general fund money to lessen the government's social service burden and to foster the societal benefits provided by charitable organizations.

The exemption statute thus falls under the "market participant" exception to the dormant Commerce Clause or is a valid governmental subsidy of charitable organizations.

5. Congress is prohibited by U.S. Const. art. I, § 9, cl. 4 from taxing real estate without apportioning the tax among the States according to their populations. Any such apportionment effort would run afoul of due process and equal protection concepts. Since Congress cannot regulate in this area, there can be no dormant Commerce Clause violation if the States enact statutes providing exemptions from real estate taxes.

ARGUMENT

INTRODUCTION

The petitioner has cited no opinion of this Court or any other court and the respondents have found no such opinion, which applies a Commerce Clause analysis to exemptions from real estate taxes. The petitioner would have this Court understand that the tax exemption here at issue is indistinguishable from the property tax exemption struck down in *I.M. Darnell & Son v. Memphis*, 208 U.S. 113 (1908) and, therefore, that the respondents' arguments concerning the implications of the exemption statute's pertaining to real estate are "foreclosed by precedent." Pet. Br. 24. In fact, the exemption at issue in *I.M. Darnell* pertained to personal property – logs – imported from a neighboring state into Tennessee. The distinction between real property, which has a fixed location, and personal property, which is movable across state

lines, is critical. This Court's opinion in *I.M. Darnell* does not apply a Commerce Clause analysis to real estate taxation and does not foreclose the arguments made herein.[11]

There are opinions of this Court and of other courts which address the constitutionality of real estate tax exemptions for charities similar to that at issue here. Those cases employ a Fourteenth Amendment or Privileges and Immunities Clause analysis, or both; not a Commerce Clause analysis. See *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968) (New Jersey statute denying nonprofit corporation real estate tax exemption based on out-of-state incorporation violates Fourteenth Amendment); *Board of Education of Kentucky Annual Conference of Methodist Episcopal Church v. Illinois*, 203 U.S. 553 (1906) (upholding under the Privileges and Immunities and Equal Protection Clauses an inheritance tax exemption requiring charity to be exercised within Illinois in order for a bequest to qualify for an exemption); *Green Acre Baha'i Institute v. Town of Eliot*, 193 A.2d 564 (Me. 1963) (upholding the same statute here at issue under a Fourteenth Amendment equal protection analysis).

The petitioner has cited no opinion of this Court or any other court which applies a dormant Commerce

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[11] The respondents are aware of one case in which the constitutionality of a real estate tax was analyzed under the Commerce Clause. The California Court of Appeal held that a tax on real estate does not restrict interstate commerce and, thus, does not violate the Commerce Clause. *R.H. Macy & Co. v. Contra Costa County*, 276 Cal. Rptr. 530 (Cal. App. 1 Dist. 1990), *cert. granted*, 500 U.S. 951, and *cert. dismissed*, 501 U.S. 1245 (1991).

Clause analysis to a tax exemption of any type for charitable organizations. Nor has the petitioner cited any opinion of this Court or any other court which holds that travel across state lines by a consumer to purchase a good or a service invokes a dormant Commerce Clause analysis.

The respondents contend that the reason for this notable absence of cases involving claims like those made by the petitioner is that the Commerce Clause does not pertain to taxes on real estate and does not pertain to tax exemptions for nonprofit organizations.

Nevertheless, the Law Court did apply a Commerce Clause analysis and found that the exemption statute does not violate the dormant Commerce Clause principles enunciated by this Court. Thus, the first part of the respondent's argument will be devoted to a discussion of the correctness of the Law Court's holding. The second and third parts of the argument will discuss why the exemption statute fits within the "market participant" or "subsidy" exceptions to the dormant Commerce Clause and why the exemption statute cannot be found to violate the dormant Commerce Clause because it does not intrude into an area of Congressional authority. If the second or third part of the respondents' argument is accepted by the Court, then there is no need to consider the first part of the argument since a Commerce Clause analysis will not pertain.

I. THE EXEMPTION STATUTE DOES NOT FACIALLY DISCRIMINATE AGAINST INTERSTATE COMMERCE AND THE LAW COURT'S CHOICE OF THE "FLEXIBLE APPROACH" TO ANALYZE THE EXEMPTION STATUTE WAS CORRECT. THE EXEMPTION STATUTE SURVIVES SCRUTINY UNDER THE FLEXIBLE APPROACH.

Taxation is the rule and exemption from taxation is the exception. *Silverman v. Town of Alton*, 451 A.2d 103, 105 (Me. 1982). The Maine Legislature has broad authority to determine which properties are subject to taxation and is under no constitutional obligation to grant property tax exemptions to any charity, college or other eleemosynary institution. See *In re Maine Central R.R. Co.*, 183 A. 844 (Me. 1936). The State has, nonetheless, decided to grant exemptions to some, but not all, charities and has decided to attach conditions to some of those exemptions.

There is no doubt that the exemption statute "discriminates" in the sense that it creates categories of property owners and treats them differently.[12] However,

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[12] The fundamental discrimination is, of course, between nonprofit organizations and for profit businesses. There are many for profit summer camps in Maine. Although the record is devoid of any evidence to support the petitioner, the petitioner not only admits but also argues strenuously that it is in competition with summer camps that are for profit businesses as well as those that are nonprofit. Pet. Br. 41. Petitioner apparently believes that there is no constitutional problem with its being tax exempt and, consequently, having a clear economic advantage over for profit camps, but that there is a problem with its not being tax exempt when nonprofit camps that benefit principally Maine residents are tax exempt. Respondents assume that petitioner would argue that the exempt nonprofit/

discrimination is not necessarily a constitutional violation. The very statute at issue here has been upheld by the Law Court against challenges based upon the Equal Protection and Privilege and Immunities Clauses. *Green Acre Baha'i Institute v. Town of Eliot, supra.* Cf. *WHYY, Inc. v. Glassboro, supra* (suggesting that denying exemption based on foreign corporation's failure to benefit the state in the same manner as do domestic nonprofit corporations would survive Fourteenth Amendment scrutiny). In fact, the statute was upheld on those grounds in the instant case and the petitioner does not seek to overturn those portions of the Law Court's decision. Nevertheless, the petitioner claims that the statute fails analysis under the dormant Commerce Clause because it facially discriminates against interstate commerce.

A. The Choice of Standard.

The respondents agree with the Law Court and the petitioner that the first step in determining whether a State statute violates the dormant Commerce Clause is to determine whether it should be analyzed under this Court's "virtually *per se* rule of invalidity" or its "more flexible approach." Pet. 5a, Pet. Br. 5. The *per se* rule of invalidity is used when a State statute directly regulates or discriminates against interstate commerce or when its

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for profit camps distinction should be upheld under an equal protection analysis but that the exempt nonprofit/taxable nonprofit camps distinction fails under the Commerce Clause. Effectively, the petitioner would be arguing, somewhat counterintuitively, that the latter distinction is subject to more rigorous constitutional scrutiny.

effect is to favor in-state economic interests over out-of-state interests. *Brown-Forman Distillers Corp. v. New York Liquor Authority*, 476 U.S. 573, 579 (1986). The flexible approach is used when the statute has only indirect effects on interstate commerce and regulates evenhandedly. *Id.* at 580; *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).[13]

The petitioner contends that the exemption statute facially discriminates against interstate commerce; that the *per se* rule of invalidity applies; and that the Law Court's fundamental error was its decision to apply the "flexible approach." However, the petitioner cannot show that the exemption statute, on its face, directly regulates or discriminates against those aspects of the petitioner's operations which constitute interstate commerce. Further, the exemption statute does not operate to deny out-of-state competitors access to Maine markets; does not tax out-of-state products or services more heavily than Maine products or services; and does not otherwise impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out-of-state.

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[13] In analyzing State taxing measures, this Court has often employed the somewhat different four-part test in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). See, *e.g.*, *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 115 S. Ct. 1331 (1995). (The Maine Superior Court used this test. Pet. 13a.) The petitioner does not argue that the exemption statute should be analyzed under the *Complete Auto* test. The third prong of that four-part test is that the State tax not discriminate against interstate commerce. The exemption statute clearly meets the other three prongs of the *Complete Auto* test (the Superior Court so found). Therefore, the petitioner would likely argue that the same result would obtain under both *Complete Auto* and the *per se* rule.

As discussed more fully in the following section of this Brief, the Law Court was correct in its choice of the flexible approach because there is no facial discrimination against interstate commerce.

B. There Is No Facial Discrimination Against Interstate Commerce.

The essence of the petitioner's argument is in the following statement by the petitioner:

> The Maine statute in issue facially discriminates against interstate commerce because in terms it denies a tax exemption to Maine charities if they provide services in Maine to too many persons who reside in other states. A predictable result is that the interstate agreements that underlie, and the interstate travel connected with, such provision of services will be deterred. And that deterrence constitutes the violation.

Pet. Br. 15-16.[14]

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[14] The petitioner argues further that, even if there were no effect on interstate travel, the exemption statute would still fail the test of constitutionality:

> [A] law penalizing, solely because of residency, transactions between citizens of different states for the provision of services would, by virtue of that distinction alone, facially discriminate against interstate commerce. Neither interstate transportation of goods nor of persons is necessary to a dormant Commerce Clause violation.

Pet. Br. 16 n.17. The petitioner begs the question of whether the "transaction" is interstate commerce. For example, if a resident of New York buys an ice cream cone from a resident of Maine in

Since the petitioner asserts that its campers pay a higher tuition or get fewer services than they would if the petitioner was exempt from real estate taxes, J.A. 43, it, assumedly, is the prospective camper's reaction to the prospect of higher tuition/fewer services which is the cause of the "predictable result."

The campers are not before this Court and the record contains no evidence that either claimed consequence of the exemption statute, higher tuition or fewer services, has had any effect on any camper or would-be camper.[15] In any event, the Commerce Clause protects out-of-state competitors but does not protect out-of-state consumers. See *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 618 (1981) (state severance tax on coal that falls mostly on out-of-state utility consumers is not discrimination under Commerce Clause).[16]

Maine, that does not mean that the sale of the ice cream cone is interstate commerce. Residency of the contracting parties is not the deciding factor. See *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 253 (1938) (mere formation of a contract between persons in different states is not within the protection of the Commerce Clause unless the performance is within its protection). The respondents would agree, however, that a law penalizing transactions solely because of the residency of the parties would be subject to analysis under the Equal Protection Clause.

[15] The petitioner cites *Fulton Corp. v. Faulkner*, 116 S. Ct. 848 (1996), for the proposition that no *de minimis* exception to a facially discriminatory tax is recognized by this Court. Pet. Br. 22. The record here shows no actual impact on camper choices. All impacts must be inferred.

[16] To the extent that taxes are passed on to campers in the form of higher tuition or fewer services, it falls upon both in-state and out-of-state campers. Further, to the extent that

The petitioner's argument should focus upon its product, camper services, rather than upon the campers. However, such a focus presents the petitioner with problems in a dormant Commerce Clause argument. First, the petitioner is not an out-of-state competitor attempting to gain access to a Maine market on an equal footing with Maine businesses. Second, its product is delivered and "consumed" entirely within Maine. This means that the petitioner is not a Maine business either importing or exporting products in interstate commerce.

In order to overcome these problems with its argument, the petitioner treats its campers who travel across state lines as articles in interstate commerce and then argues that the exemption statute discriminates against it because it "imports" articles of commerce. The petitioner makes a corollary argument, based on *Edwards v. California*, 314 U.S. 160 (1941) and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), that the exemption statute discriminates against the campers' interstate travel and that this is the equivalent of discrimination against out-of-state products that is forbidden by the dormant Commerce Clause. Pet. Br. 19-21. The petitioner's arguments are flawed.

1. The campers are not articles in interstate commerce.

The petitioner would have this Court treat the campers who travel to Maine from other states as articles

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campers of tax exempt camps benefit from the exemption, that benefit flows to both in-state and out-of-state campers.

in interstate commerce and view the exemption statute as facially discriminating against the petitioner because it deals in articles of interstate commerce. There are two bases upon which the petitioner attempts to support this proposition. The first is that the campers are "articles" and the second is that the campers' travel across State lines converts a service delivered and consumed locally into a transaction which implicates the Commerce Clause. With respect to the first point, no case cited by the petitioner treats consumers who purchase goods or services as themselves being articles in commerce. Unlike the goods and services that have been the focus of this Court's Commerce Clause analyses, consumers make a choice of whether to travel across state lines to purchase goods and services. That choice is influenced by many factors; some of these are price, the State's tourism promotion efforts and, here, the petitioner's advertising and recruitment efforts. The campers are not imported from another state into Maine (Cf. *I.M. Darnell & Son v. Memphis, supra* (saw logs imported into Tennessee)), or exported by the petitioner from Maine to another State (Cf. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (waste exported from Pennsylvania into New Jersey)). If the petitioner's position were accepted, then the hunter who crosses state lines and purchases a nonresident hunting license would be an article in commerce. Cf. *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). The student who crosses state lines to attend a state university and pays nonresident tuition would be an article in commerce. Cf. *Johns v. Redeker*, 406 F.2d 878 (8th Cir.), *cert. denied*, 396 U.S. 853 (1969); *Vlandis v. Kline*, 412

U.S. 441, 452 (1973). The implications of viewing consumers as articles in commerce are far reaching.[17]

The second basis for the petitioner's proposition is that the campers' travel across state lines to purchase and use the petitioner's services somehow converts the service provided by the petitioner entirely within Maine into

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[17] The petitioner contends that the interstate commerce here is the same as that for a college. Pet. Br. 19. If the Commerce Clause analysis urged here by the petitioner were applied to nonresident tuition differentials at public colleges and universities, the justifications that have been accepted under an Equal Protection analysis would be unavailable. The students would be articles in interstate commerce and the States could not burden that commerce by imposing higher tuition than those charged to resident students. This would be a line of reasoning and, likely, a result completely at odds with this Court's views expressed pursuant to an equal protection analysis in *Vlandis*:

> We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.

Vlandis v. Kline, 412 U.S. at 452-453.

Further, Chief Justice Burger, in his dissent, wrote:

> It is not narrow provincialism for the State to think that each State should carry its own educational burdens. Until we redefine our system of government – as we are free to do by constitutionally prescribed means – the States may restrict subsidized education to their own residents. This much the Court recognizes and it likewise recognizes that the statutory scheme under review reasonably tends to support that end.

Id. at 459-460.

a product in interstate commerce. This Court has never gone so far and, in fact, has rejected the argument that a business carried on intra-state is converted to an inter-state business because customers from out-of-state are induced to patronize the business. *Western Live Stock v. Bureau of Revenue*, 303 U.S. at 253 (taxation of a local business separate and distinct from the transportation and intercourse which is interstate commerce is not forbidden merely because such transportation or intercourse is induced or occasioned by the business). If the campers' choice to cross state lines to consume a product or service made the product or service an article in interstate commerce, then intra-state commerce would virtually cease to exist. See *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 115 S. Ct. 1331 (1995) (sale of ticket for interstate bus travel is a local transaction, and there is no requirement that tax on that sale be apportioned).

2. Neither *Edwards v. California* nor *Heart of Atlanta Motel, Inc. v. United States* supports the position that the Commerce Clause protects campers crossing State lines against the alleged effects of the exemption statute.

A corollary argument to the petitioner's argument that campers are articles in commerce is that the dormant Commerce Clause protects interstate travel by persons just as it protects the interstate transportation of goods. The petitioner states:

> [I]t cannot be argued that the interstate travel necessarily associated with petitioner's service of non-residents is unprotected. For it is established that the dormant Commerce Clause protects interstate travel just as it does interstate transportation of lumber.

Pet. Br. 20. For this proposition, the petitioner relies upon *Edwards v. California, supra*. The petitioner's reliance is misplaced. *Edwards* involved a Depression era California statute making it a misdemeanor, *i.e.*, a crime, to transport nonresident indigent persons into that State. It is true that Justice Byrnes, writing for himself and four other members, found that the California statute offended the Commerce Clause. However, Justice Douglas, writing for himself and two other members, filed a concurring opinion finding the right of travel to be a fundamental right of citizenship protected by the Privileges and Immunities Clause. Justice Jackson also filed a concurring opinion in which he relied upon the Privileges and Immunities Clause. Essentially, *Edwards* is an early "right-to-travel" or "personal mobility" case. See R. Rotunda & J. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 11.10 (2d ed. 1992). The quintessential right-to-travel case came some years later in *Shapiro v. Thompson*, 394 U.S. 618 (1969). That opinion does not rely on the Commerce Clause for the "right to travel." See *id.* at 630 n.8.

Edwards simply does not support the proposition which, ultimately, the petitioner wants it to serve, *viz.*: that the Commerce Clause regards people making consumer choices and traveling across State lines to act on

those choices the same as it regards objects shipped in interstate commerce.[18]

The further distinguishing aspect of *Edwards* is California's obvious purpose to keep indigent persons out of California by penalizing those who transported them into the State. As pointed out by the Law Court, there is no intent in the Maine exemption statute to keep nonresident campers out of Maine. Pet. 6a.

The petitioner also relies on *Heart of Atlanta Motel, Inc. v. United States, supra.*[19] However, *Heart of Atlanta Motel* is distinguishable from the case at bar in important respects. *Heart of Atlanta Motel* was a "positive" Commerce Clause case involving a challenge to Congress' authority to enact the public accommodations provisions of the Civil Rights Act. The Court found that Congress has that authority and noted that Congress had before it "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." *Id.* at 257. Overnight accommodations were essential facilities for African Americans seeking to exercise their right to interstate travel. *Heart of Atlanta Motel,* properly interpreted, stands for the proposition that Congress may regulate the provision of services which are essential to the ability of citizens to exercise their right to interstate travel. This Court has referred to these services as the

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[18] The respondents would agree that the Commerce Clause protects the provision of transportation, *e.g.,* bus service, to persons crossing State lines.

[19] That opinion is also cited in a "see" citation by the Maine Superior Court. Pet. 14a-15a n.2.

"channels of interstate commerce." *United States v. Lopez,* 115 S. Ct. 1624, 1629 (1995).

The Court's opinion in *Heart of Atlanta Motel* does not compel the conclusion here that the Commerce Clause protects the campers' interstate travel from the alleged deterrent effects of the exemption statute. Marginal increases in tuition for petitioner's campers – both resident and nonresident – are very different from preventing travelers from using lodging accommodations. The Law Court found:

> [A]lthough the record suggests that the denial of a tax exemption results in increased costs that are passed along "to some extent" to the campers in the form of increased tuition, there is no evidence that the exemption statute impedes interstate travel or that Camps provides services that are necessary for interstate travel.

Pet. 7a. In fact, the petitioner is not engaged in providing lodging or any other service necessary for interstate travel.[20]

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[20] At several points in its Brief, the petitioner suggests that a State could not, under the dormant Commerce Clause, "penalize" a hotel for "importing" nonresident guests (Pet. Br. 20) or enact an exemption from an accommodations tax for hotels that serve mostly State residents (Pet. Br. 32). Such legislation might well fail under an equal protection or due process analysis but it would not necessarily trigger a dormant Commerce Clause analysis. Whether the Commerce Clause would be implicated would depend upon whether affecting the price of lodging through tax policy would be viewed as disrupting the right of citizens to move in interstate travel. The hypothetical posited by the petitioner is much different from the outright denial of accommodations which the Court found so

Since the campers are not articles in interstate commerce, the exemption statute does not facially discriminate against the petitioner based upon its providing camper services.

C. The Exemption Statute Pertains to Real Estate and Not to Articles in Interstate Commerce and Is Properly Analyzed Under the Flexible Approach. Any Effect on Interstate Commerce Is Indirect. The Exemption Statute Survives Scrutiny Under the Flexible Approach.

Even if one assumes that the campers are articles in interstate commerce and, therefore, that the petitioner engages in interstate commerce because of providing services to them, the exemption statute still does not facially discriminate against interstate commerce because the statute is fundamentally about taxation of real estate. Any effect that it has on articles in interstate commerce, *i.e.*, the campers, is secondary and incidental and does not invoke the rule of *per se* invalidity.

As noted earlier, this Court has never found that taxes on real estate implicate a Commerce Clause

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compelling in *Heart of Atlanta Motel*. Further, if the Commerce Clause were implicated, it is likely that any effect would be viewed as incidental, if the tax was upon real estate, and, therefore, the flexible approach would apply. It is not clear that the State's interest in making such a distinction would be sufficient to survive analysis under the flexible approach. The State's interest certainly would be different from that in the instant case.

analysis.[21] Yet, this is precisely what the petitioner is asking from this Court in the instant case.

The exemption statute creates an exemption from real estate taxes that are assessed by municipalities based upon the "just value" of the property as of April 1st each year. The tax is assessed on land, buildings and equipment of all residential, commercial and industrial property owners in each municipality, except as exempted by the State. (Those taxed include the many for profit summer camps in Maine.) The tax revenue is placed in the general fund of the taxing municipality to fund police, fire, road maintenance, recreation and other services. The exemption here turns upon the property owner (it must be a charity) and the use of the property (it must be used exclusively for charitable purposes and for the benefit of residents).

The Law Court found that the exemption statute does not tax the persons served by the charity:

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[21] In *R.H. Macy & Co. v. Contra Costa County, supra* note 11, the California Court of Appeal addressed the application of the Commerce Clause to Proposition XIII, which allowed real estate to be taxed at its acquisition value:

> [A]rticle XIII A does not restrict interstate commerce because it taxes only real property within the state. It is widely recognized that interstate commerce deals with the flow of goods and services between and among the several states (citations omitted) and that "A tax on property or upon a taxable event in the state, apart from operation, does not interfere [with interstate commerce]." (*Southern Pac. Co. v. Gallagher*, 306 U.S. 167, 178, 59 S. Ct. 389, 394, 83 L.Ed. 586 (1939).)

276 Cal. Rptr. at 541.

> Moreover, the exemption statute is not directed at taxes on the persons served by the charity but, rather, on real property taxes for which the charity would otherwise be liable.

Pet. 6a. The tax is "twice removed" from the camper: First, it is a tax on the real estate; second, it may be built into the tuition; third, the camper pays a portion of the tax in the form of tuition. The exemption statute does not discriminate based upon the residency of the purchaser of the service but on the residency of the person benefitted by the charity. Here, the purchaser and the person benefitted happen to be the same person.

The petitioner states that the tax paid by the petitioner is, to some extent, passed on to the campers, Pet. Br. 3, and that this "deters" interstate travel and interstate agreements. Pet. Br. 16. However, if the charitable organization charged nothing for its services, *e.g.*, in the case of a "soup kitchen" or a camp which served indigent persons, then there would be no pass-through of taxes to the interstate traveler and no interstate agreements and, therefore, no "deterrence." This proves the point made by the Law Court. Any effect on the consumer and, thus, on the business of the charity, is secondary and not apparent on the face of the exemption statute or felt in its primary effect.

The point is further made by the case of a charitable organization that is headquartered in one State but provides its service almost entirely to persons who reside in another State and who do not travel to the "headquarters" State to benefit from the service. In such a situation, there would be no travel to be "deterred." This very situation, which the petitioner calls a "fanciful construct"

(Pet. Br. 16 n.17), appears to exist in the District of Columbia, which has an exemption provision requiring charitable services to be delivered within the District in order to qualify for an exemption. D.C. Code § 47-1002(8), *supra* note 4. The District would appear to be the headquarters for many nonprofits. (Six of the *amici* list addresses in the District.) It is highly unlikely that groups such as the National Association of Independent Colleges and Universities or the National Council of Nonprofit Associations serve many residents of the District.[22] Thus, notwithstanding that the District "discriminates" against nonprofit organizations serving nonresidents, there is no travel to trigger the petitioner's Commerce Clause analysis.

Despite the petitioner's creative arguments attempting to make the exemption statute facially pertain to travel and articles in interstate commerce, the statute is fundamentally about real estate taxation, a form of taxation that is uniquely intra-state. See *Curry v. McCanless*, 307 U.S. 357, 364 (1939).[23] When viewed as an exemption

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[22] The District of Columbia's interpretation of its exemption provision was challenged by the National Medical Association, a nonprofit organization serving physicians nationwide, on grounds other than the dormant Commerce Clause. *National Medical Association, Inc. v. District of Columbia*, 611 A.2d 53 (D.C. App. 1992).

[23] Respected commentators in the area of State taxation have not treated real estate taxes as invoking Commerce Clause scrutiny. In *Federal Limitations on State and Local Taxation*, the author discusses both Commerce Clause and Due Process Clause limitations on State taxation simultaneously on the basis that there is "often a close relationship or overlapping in the nature of the limitations that each clause places on state and

from real estate taxes, it is clear that the exemption statute does not facially discriminate against interstate commerce. It is even handed in its treatment; all charities operating in Maine have an equal opportunity to qualify for the exemption from a tax to which all property owners are subject by providing something in return to the State.

The fact that the petitioner may be engaged in interstate commerce does not place the petitioner in a preferred position with respect to local real estate taxes. Those engaged in interstate commerce must pay their fair share of State taxes. *Western Live Stock v. Bureau of Revenue*, 303 U.S. at 254 (not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business).

The petitioner does not argue directly that the exemption statute fails when analyzed under the flexible

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local taxing power when multistate operations are involved." P. Hartman, *Federal Limitations on State and Local Taxation* § 2:1 at 12 (1981). However, he later states that challenges to the taxation of property only involve due process considerations since "interstate commerce is not involved." Hartman, § 2:8 at 40-41.

In *State Taxation*, the authors comment upon the Superior Court opinion in the instant case:

> [T]he Maine court's conclusion that the Commerce Clause bars the States from limiting a tax exemption to camps serving resident campers stretches the reach of the negative Commerce Clause to its limits, if not beyond.

J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 4.12[1][k][v] at S4-11, 12 (2d ed. 1993 & Supp. 1994).

approach but does criticize the Law Court for not engaging in an analysis of alternatives available to the Maine Legislature which would have lessened the burden on interstate commerce. Pet. Br. 30. The petitioner further argues that this Court should consider Maine's legislative intent when applying "ordinary Commerce Clause canons." Pet. Br. 35. After stating that it will assume a licit purpose – to provide public support for charities – the petitioner goes on to insinuate illicit legislative motivations. Pet. Br. 36-37. The respondents have argued against the petitioner's use of the legislative history of the exemption statute. Br. Opp. 12-14. That need not be repeated here.

The Law Court found that, if the exemption statute has any impact on interstate travel, it is incidental:

> [I]t is not the purpose of the exemption statute to affect the number of out-of-state campers attending summer camps within Maine. Because the exemption statute regulates evenhandedly with only incidental effects on interstate commerce, we apply the flexible approach . . . .

Pet. 6a. Going on to measure the statute under the flexible approach, the Law Court found a legitimate State interest in the statute's purpose to relieve charities from the burden of taxes on their limited budgets and thereby to recognize and promote the public benefits that they provide. Pet. 6a. It further found that the statute neither increases costs to out-of-state firms nor forces them to leave the market and that there is no evidence that the statute impedes interstate travel or that the petitioner provides services necessary for interstate travel. *Id.* at 7a.

Therefore, the exemption statute was found to meet the test under the flexible approach.

The petitioner's suggested alternatives available to the State deserve comment. They include vouchers to residents for use at licensed camps; payments made directly to the institutions to defray residents' fees; and the provision of subsidies to institutions. Pet. Br. 30-31. The petitioner suggests that all of these would be constitutional. Assumedly, the petitioner intends that it would get a tax exemption and that the State would pay for vouchers, make direct payments to defray residents' fees and/or pay subsidies. Yet, under each of these "alternatives," the State or its political subdivision would pay twice. First, it would lose tax revenues through the tax exemption. Second, it would take money from the general fund and pay it to the petitioner. It seems unlikely that any State would enact such a system. It is certainly not constitutionally required.

The Law Court correctly chose and applied the flexible approach.

II. THE EXEMPTION STATUTE FALLS WITHIN THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE OR CONFERS A VALID SUBSIDY UPON CERTAIN CHARITIES. THE STATE CANNOT BE FORCED TO SUBSIDIZE TUITIONS FOR CAMPERS.

The Law Court recognized that tax exemptions, including those granted pursuant to the exemption statute, are explicitly characterized in Maine's statutes as

"tax expenditures."[24] Pet. 4a. Further, as the Law Court has found in another case, expenditures of public funds *via* the tax exemption place a tax burden upon nonexempt taxpayers just like any other public expenditures:

> Exemption from tax places an equivalent burden on the remaining taxpayers. Loss in tax revenue from exemption must be balanced by increased assessments on others.

Green Acre Baha'i Institute v. Town of Eliot, 193 A.2d at 566. Here, that extra burden is shouldered by local property tax payers and other Maine taxpayers through state subsidies for education[25] as well as through state-municipal revenue sharing.[26]

Property tax exemptions for charities have a special role and special characteristics which distinguish them from other types of exemptions that have been analyzed by this Court. First, exemptions for charities are not designed to confer competitive advantages to in-state

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[24] **36 M.R.S.A. § 196. Tax Expenditure**

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Tax expenditure. "Tax expenditure" means provisions of state law which result in a reduction of tax revenue due to special exclusions, exemptions, deductions, credits, preferential rates or deferral of tax liability.

[25] 20-A M.R.S.A. § 15601 *et seq.* See *School Administrative District No. 1 v. Commissioner, Department of Education*, 659 A.2d 854 (Me. 1995).

[26] 20-A M.R.S.A. § 5681 *et seq.*

economic interests.[27] Cf. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (exemption from liquor excise tax for certain types of domestic liquors violates dormant Commerce Clause because it has both the purpose and effect of discriminating in favor of local products). Instead, they are awarded in recognition of the value to society of the work done by the charitable organization. Second, exemptions for charities pertain to real and personal property taxes which are broad based and nondiscriminatory. Every nonexempt property owner, corporation or individual, resident or nonresident, must pay the tax levied. Since the exemption shifts the burden of lost taxes to the remaining property owners, the effects of the exemption are also broad based and nondiscriminatory. Cf. *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994) (subsidy program funded primarily by tax on sale of out-of-state milk and not out of general revenue violates the Commerce Clause). Third, exemptions for charities are granted in return for a service. They are part of a *quid pro quo*. This is unlike exemptions intended to promote the competitive position of certain for profit businesses.

Courts have typically justified the granting of real estate tax exemptions based upon the recipient charitable organization's either (1) relieving the government of a fiscal burden it would otherwise assume or (2) conferring

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[27] These distinctions were alluded to by the Law Court below. Pet. 6a. Contrary to the petitioner's assertions (Pet. Br. 39, *et seq.*), the respondents do not contend that the nonprofit sector of the economy is unprotected by the Commerce Clause. It is the treatment of property tax exemptions for nonprofits under the Commerce Clause which the respondents contend is distinctive.

a benefit upon the general public through the social good which the charitable organization promotes. See, *e.g.*, *Utah County v. Intermountain Health Care, Inc.*, 709 P.2d 265 (Utah 1985); *Electric Power Research Institute, Inc. v. City and County of Denver*, 737 P.2d 822, 830 (Col. 1987) (concurring opinion). A leading text on the topic of taxation of charities, supported by references to many state court opinions, explains:

> Exemption of charitable property flows from the concept that property used for public activities and functions should not be taxed. Hence it follows that because charitable property renders a public service and is used for public functions it should be tax exempt. Formulated in terms of the so-called governmental theory of tax exemption, private charities perform functions that the state would be required to undertake and tax exemption is granted as a *quid pro quo* for the performance of these functions and services. Many courts expand the governmental doctrine into the humanitarian theory under which tax exemption is justified not only for the performance of functions which relieve the state of its burden but also for activities which further socially desirable objectives considered of benefit to the community. (Footnotes omitted.)

Fisch, *et al.*, *Charities and Charitable Foundations* § 787 at 602-603 (1974). See also W. Ginsberg, *The Real Property Tax Exemption of Nonprofit Organizations: A Perspective*, 53 Temp. L. Q. 291 (1980) and cases cited therein; Note, *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, 64 Harv. L. Rev. 288, 288-289 (1950). Some courts have observed that without this *quid pro quo* – tax exemption in return for relieving a

public burden/conferring a public benefit – property tax exemptions would violate the principle of equal taxation and would be nothing more than a gift of public funds at the expense of the nonexempt taxpayer. See *Kimberly School v. Town of Montclair*, 60 A.2d 313 (N.J. 1948).

As previously noted, this Court has not had occasion to review a property tax exemption for charities under the dormant Commerce Clause. When analyzed, exemptions for charities such as the exemption statute should be upheld under either the market participant exception to the dormant Commerce Clause or as direct governmental subsides from the general fund not subject to the Commerce Clause.[28]

A. The State is a "Market Participant."

The expenditures which exemptions for charities represent can be viewed as "purchases" of services through a tax exemption. The purchase is funded by all nonexempt taxpayers, just as any purchase of goods or services by the government is funded. It makes no economic difference to the taxpayer whether his or her money is actually paid to the charities or is used by the municipality to replace tax money lost through exemption of those charities. Further, it makes no economic difference to the charity whether it receives money from the municipality to pay its taxes or is relieved from the obligation of paying taxes.

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[28] The petitioner has characterized the market participant exemption as "simply irrelevant." Pet. Br. 34.

The services purchased are those things that the charity does in carrying out its mission. It might be feeding the homeless at a "soup kitchen," providing transportation to the elderly or, as with the petitioner, helping "children to grow spiritually, mentally and physically . . . and thereby to become good citizens in society as adults." Pet. Br. 2. What services the State will purchase with exemption dollars is a legislative decision. From whom the State will purchase those services is also a legislative decision. It is, of course, this latter point which is at issue in the instant case.

State and local governments may choose to do business solely with in-state providers of goods and services without running afoul of the dormant Commerce Clause. This Court has held that when state and local governments participate as buyers in the market place, the choices they make do not invoke Commerce Clause scrutiny because the governmental units are not regulating markets, they are participating in them as consumers. For example, in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), this Court upheld a Maryland program in which the State paid a bounty for Maryland titled junk cars converted to scrap. (The State never took title to the hulks.) When the State enacted regulations which made participation in the bounty program more difficult for out-of-state scrap processors than for those in Maryland, the out-of-state processors challenged the regulations under the Commerce Clause. This Court upheld the program and observed that the bounty program did not involve the kind of action with which the Commerce Clause is concerned:

> But no trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes their [car hulks] movement out of State. They remain within Maryland in response to market forces, including that exerted by money from the State. Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others. (Footnotes omitted).

Id. at 809-810. Maryland had become a market participant by becoming "a purchaser, in effect, of a particular article of interstate commerce," *i.e.*, car hulks, and by bidding up the price through the bounty system. See also *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (upholding law restricting sales from state owned cement plant to state residents and observing that the Commerce Clause does not prevent a legislature from "fashioning . . . effective and creative programs for solving local problems and distributing government largesse").

In *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204 (1983), the Mayor of Boston issued an executive order requiring that construction projects in Boston funded in whole or in part with City money be built by contractors with a work force consisting of at least fifty percent Boston residents. This Court upheld the order, finding that Boston was a market participant rather than a market regulator:

> If the City is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the City demands

> for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the City is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.

Id. at 210.

The exemption provided by Maine's exemption statute is analogous to the types of market participation that have been upheld by this Court and found not to invoke a Commerce Clause analysis. The statute's purpose is to make tax expenditures which relieve the State from some of its burden of providing social services and is entirely consistent with the "governmental theory" of tax exemptions for charities. See Fisch, *et al., Charities and Charitable Foundations, supra*. Since that burden is primarily with respect to Maine residents, it is not surprising that the State chooses to purchase charitable services from exempt organizations that will serve primarily Maine residents. This Court's observation in *Reeves, Inc. v. Stake, supra*, is especially apt:

> The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps

> "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government – to serve the citizens of the State.

447 U.S. at 442.

B. Property Tax Exemptions For Charities Are Subsidies.

Maine's statutory and case law treatment of tax exemptions as expenditures may also be analogized to subsidization of private sector business with public funds which the petitioner concedes would be approved by this Court. Pet. Br. 31. With respect to the nonprofit sector, the taxpayers subsidize the qualifying charity so that it can expend its funds on charity – relieving a public burden/conferring a public benefit – rather than on payment of taxes.

This Court has recently observed that: "A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. at 2214. The petitioner, in fact, recognizes that "subsidies to charitable institutions related in some way to their service to residents" would be constitutionally permissible. Pet. Br. 31.

The exemption statute places a tax burden on the nonexempt property owners of Harrison by shrinking the Town's tax base. They must make up the revenue lost to the Town budget because of exemptions from the property tax. School funding and municipal revenue sharing also mean that, to some extent, all Maine taxpayers who

contribute to the State's general fund through income and other taxes also pay for the exemption. Whether cast as an exemption or a subsidy, the effect on Harrison's taxpayers is the same, *viz.*: They pay more in taxes than they would without the exemption. If the exemption statute were replaced with one of the so-called "reasonable and adequate alternatives" – vouchers, direct payments and scholarships – suggested by the petitioner as being constitutionally permissible (Pet. Br. 30-31), the result would be the same as it is under the exemption statute: Each of the petitioner's alternatives is a subsidy to either the consumer of the charitable service or the provider of the service. The subsidy must be funded by tax monies raised from nonexempt properties just as the exemption is "funded."

The exemption statute effects a subsidy for certain charitable organizations and should be regarded as the equivalent of a subsidy for purposes of dormant Commerce Clause analysis. The fact that the State has chosen which organizations to subsidize through the exemption statute, *i.e.*, that it has discriminated, does not mean that it has violated the dormant Commerce Clause.

C. The State is Not Obligated to Subsidize the Tuitions of Nonresidents.

The market participant exception and the subsidy discussed in this portion of the Brief are related concepts. Under either construct, government money enters the market place and has an influence on the market. The petitioner may argue that tax exemptions have been viewed by this Court as the equivalent of a tax, not the

purchase of services or the subsidization of business from the general fund, and may point to *Bacchus Imports, Ltd. v. Dias, supra,* to support its position. *Bacchus Imports* did treat the exemption from an excise tax as the functional equivalent of a tax designed to advantage in-state business interests to the detriment of out-of-state business interests. However, as already discussed, a charitable exemption is very different. Its purpose is not to advantage an in-state economic interest but, rather, to secure charitable services for the public. There is a *quid pro quo* with tax exemptions for charities that is not present with tax exemptions for profit making businesses.

In *Alexandria Scrap, supra,* Justice Stevens wrote a concurring opinion which provides a helpful analysis for tax exemptions such as those at issue here. Justice Stevens pointed out that there is an important distinction for Commerce Clause purposes between free enterprise markets and those effectively created by the participation of the government:

> It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program.

426 U.S. at 815. He went on to observe:

> That commerce, which is now said to be burdened, would never have existed if in the first instance Maryland had decided to confine its subsidy to operators of Maryland plants. A failure to create that commerce would have been unobjectionable because the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business. Nor, in

> my judgment, does that Clause inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.

Id. at 815-816.

In the instant case, the petitioner is complaining that it is not being allowed into the market of tax exempt nonprofit camps and, as a result, that its campers pay higher tuition and get fewer services than they would if the petitioner were in that market. In other words, the petitioner complains that its campers are not being subsidized by the State. But the market of tax exempt nonprofit camps exists only because the State has, through the exemption mechanism, entered the market. The State has created that market but, in so doing, has not obligated itself to subsidize the tuition of nonresident campers.

III. CONGRESS MAY NOT TAX REAL ESTATE AND THE EXEMPTION STATUTE DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BECAUSE IT DOES NOT INTRUDE INTO AN AREA OF CONGRESSIONAL AUTHORITY.

A. Congress Has Only Limited Authority Under the Commerce Clause.

The Commerce Clause is a broad grant of authority by the People to Congress to regulate commerce among

the several States. U.S. Const. art I., § 8, cl. 3. The authority granted "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *United States v. Lopez*, 115 S. Ct. 1624, 1627 (1995) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

The authority of Congress under the Commerce Clause is not, however, unlimited. As Chief Justice Marshall wrote in *Gibbons v. Ogden*, those limits are prescribed in the Constitution itself. One source of limitation is in the language of the Commerce Clause. Congress may only "regulate Commerce . . . *among the several states* . . . ." U.S. Const. art I, § 8, cl. 3. (emphasis added). What constitutes "Commerce" as well as what constitutes "interstate commerce" have been the subject of numerous opinions of this Court. See *United States v. Lopez*, 115 S. Ct. at 1634-1642 (Kennedy, J., concurring.)

Further limitations on the authority of Congress under the Commerce Clause are found in other provisions of the Constitution. It is certain of these other Constitutional provisions which are of concern here.

B. Taxes on Real Estate are Direct Taxes Beyond the Authority of Congress.

One constitutional provision that restrains Congressional power under the Commerce Clause is Article I,

Section 9, Clause 4, which limits the Congressional power of taxation:[29]

> No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

U.S. Const. art I, § 9, cl. 4.

Further statement of this limitation is found in Article I, Section 2, Clause 3:

> [D]irect Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .

U.S. Const. art I, § 2, cl. 3.

The key term in these provisions is "direct tax" and the central question is whether it includes taxes on real estate.

This Court grappled with the meaning of "direct tax," as used in Article I, in several cases decided during the nineteenth century. Perhaps the definitive treatment of what is a "direct tax" is found in *Springer v. United States*, 102 U.S. 586 (1880). In *Springer*, the central

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[29] The power of taxation is found in Article I, Section 8, Clause 1:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and General Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . . .

U.S. Const. art I, § 8, cl. 1.

question presented was whether the income tax at issue was a "direct tax." *Id.* at 592. The Court reviewed in detail the history of the direct tax language in the Constitution. *Id.* at 595-599. In the end, the Court concluded:

> [D]irect taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate . . . .

Id. at 602. The Court thus found that a tax on real estate is a direct tax.[30]

It may be argued that the precise limitation of the Constitution is that real estate taxes may not be enacted unless they are apportioned among the States according to the Census and that this does leave open the possibility that Congress could impose real estate taxes, notwithstanding that they are direct taxes. While the letter of the constitutional provisions relating to taxes would seem to admit of this possibility, the results of apportioning real estate taxes would violate other constitutional provisions.

The issue of apportioning direct taxes was discussed in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1756). That case involved a challenge to a federal tax on "pleasure-carriages" on the grounds that it was a direct tax that had not been apportioned among the States. Each of the four Justices who heard the case issued a separate opinion upholding the tax. Justice Chase wrote the lead opinion and the other Justices wrote concurring opinions. In his

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[30] Ultimately, the Sixteenth Amendment resolved the constitutional issue about taxes on all income, "from whatever source derived."

opinion, Justice Chase commented upon the "great inequality and injustice" that would result if taxes on individual articles, *e.g.*, carriages, were apportioned and concluded that "it is unreasonable to say, that the Constitution intended such tax should be laid by that rule." *Id.* at 174. In his concurring opinion, Justice Paterson[31] explained the political reasons for the apportionment requirement attached to direct taxes:

> The southern states, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves . . . and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars, was the reason of introducing the clause to the Constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.

Id. Justice Paterson then went on to discuss the many difficulties that would be encountered if the federal government ever tried to tax real estate and observed that it would not be likely to be any more successful than the "requisition" upon the states during the confederation. *Id.* at 178.

The issues of fundamental fairness raised by apportioning a federal tax on personal property, as alluded to by Justice Chase in *Hylton*, are also present in apportioning a federal tax on real estate. The federal government

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[31] Both Justices Chase and Paterson had been members of the Constitutional Convention. *Springer v. United States*, 102 U.S. at 599-600.

would need to place a value on each parcel of land to be taxed. (This might or might not be the same as the values now used by local governments. The difficulties inherent in this were addressed by Justice Paterson in *Hylton*.) It would then need to calculate the taxes to be raised from a tax on the real estate in each State assessed based upon the population and the total value of real estate within each State. This would result in real estate located in a State with little land and a large population being taxed at a much higher rate (dollars per acre) than, for example, equivalent real estate in a State with a large land area and a small population. The tax would have little to do with the quality of the land itself or with its "fair market value" and, instead, would be determined by the population and geography of the State in which it is located. Such a system would raise insurmountable due process, equal protection and privileges and immunities problems.

There is no national real estate tax today. There has not been a federal real estate tax since before the Civil War. An authority on federal taxation has made the following observation:

> Congress could easily apportion a fixed-amount poll tax among the states in proportion to population; but apportionment of other types of taxes would require a different rate for every state in order to insure that the aggregate amount paid by each state was proportional to its population rather than to the value of the taxable items within its borders. As a practical matter, therefore, apportioned taxes have not been levied by Congress for more than a century.

B. Bitker, *Federal Income Taxation* ¶ 1.1 at 1-2 (2d ed. 1995).[32]

Thus, an unapportioned tax on real estate violates the letter of the United States Constitution and is, therefore, beyond the authority of Congress. If Congress attempted to apportion a real estate tax, it could not do so without creating gross inequities that would offend the principles of due process and equal protection and would violate the Privileges and Immunities Clause. In any event, Congress cannot enact an *ad valorem* property tax, *i.e.*, one based strictly upon a "fair market value" assessment, such as the municipal property tax at issue in the instant case.

C. Since Congress Cannot Impose a National Real Estate Tax, State Real Estate Taxes and Exemptions Therefrom Cannot Violate the Dormant Commerce Clause.

As discussed above, the Commerce Clause is a grant of authority to Congress. The dormant Commerce Clause protects that Congressional authority. When the States exercise their taxing authority, they must do so in a manner that does not interfere with Congressional authority and, thereby, violate the dormant Commerce Clause. This Court has expressed the proposition thus:

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[32] The Court's opinion in *Springer*, *supra*, lists several acts of Congress between adoption of the Constitution in 1789 and 1861 which imposed a direct tax. The acts imposed the tax on real estate and slaves. None of these enactments was tested by the Court.

> Section 8, clause 3, article 1 of the Constitution declares that 'Congress shall have Power To regulate Commerce with foreign Nations, and among the several States.' In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. (Citations omitted.)

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45 (1940).

Here, the taxation of real estate is a direct tax which is beyond the authority of Congress under the Commerce Clause or any other provision of the Constitution unless it is done with apportionment based on population. The States, therefore, are not infringing on the authority of Congress under the Commerce Clause when they, through their municipalities, impose unapportioned *ad valorem* taxes on real estate or enact, as part of their regime of real estate taxation, exemptions therefrom.

The exemption statute, which is an integral part of Maine's system of unapportioned real estate taxation, cannot be found to violate the dormant Commerce Clause because it does not infringe upon the authority conferred upon Congress. This, of course, is not to say that the statute escapes Constitutional scrutiny. It is subject to examination under the Equal Protection and Due Process provisions of the Fourteenth Amendment and under the Privileges and Immunities Clause. The Law Court held,

and the petitioner concedes, that the exemption statute meets those tests.

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted,

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June 12, 1996